WESTERN MINING ACTION PROJECT

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Via Electronic Mail

October 11, 2018

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Re: Rocky Mountain Resources' Mid-Continent Mine/Quarry

Dear BLM Officials:

This letter is submitted on behalf of the Glenwood Springs Citizens' Alliance ("GSCA"), by and through their undersigned attorney. GSCA has become aware of serious issues regarding whether operations at the Mid-Continent Mine ("Mine") just outside of Glenwood Springs, operated by Rocky Mountain Resources ("RMR"), have been, and currently are, in violation of federal law and RMR's Plan of Operations ("PoO").

GSCA is a non-profit organization that works to protect the human, natural, environmental, and community resources of the Glenwood Springs, Colorado area. GSCA is particularly concerned about the ongoing and proposed activities associated with the Mid-Continent Mine/Quarry located just above (north) of Glenwood Springs on BLM-managed public lands. GSCA's members reside in Glenwood Springs, in the Roaring Fork Valley, and in the areas affected

by the Mine, including those who live in close proximity to the current operations and haul routes, and are, and will be, significantly and adversely affected by current operations and by any expansion of the Mine/Quarry and increased use of local streets and community infrastructure by the Mine/Quarry operations.

BLM first approved the PoO for the Mine in 1982 and the PoO was amended in 1989. Based on information obtained by GSCA regarding operations at the site, it appears the RMR has been, and currently is, conducting operations in violation of the PoO and not in accordance with federal mining and public land law.[1] Accordingly GSCA requests that BLM conduct an immediate and thorough investigation to determine whether there have been any violations of the PoO and/or federal or state law and, if found, begin enforcement actions against RMR and order an immediate suspension of all operations/activities that are not in full compliance with the PoO and applicable law. The following issues warrant your immediate attention and action.

I. Removal and Sale of Non-Locatable Minerals Resulting in Mineral Material Trespass

The original Mine was reviewed and approved by BLM as mining only chemical/high-grade limestone as a locatable mineral under the 1872 Mining Law. *See* 1982 Environmental Assessment for Mid-Continent Limestone Quarry.[2] However, based on recent RMR documents, it appears that RMR has been excavating and selling common variety minerals. For example, the attached RMR document entitled "2018 Rocky Mountain Resources – Mid Continent Quarry Price Sheet," shows that RMR is producing, and selling, the following materials from the site: "Road Base," "Structural Fill," "Rip Rap," "Screened Rock," and various types of "Boulders."

None of these materials qualify as locatable minerals under the 1872 Mining Law, 30 U.S.C. §§ 22 et seq., the 1947 Materials Act, 30 U.S.C. §§ 601-604, or the 1955 Common Varieties Act, 30 U.S.C. § 611. "The Department has consistently held that materials suitable only for fill purposes, for road base or for comparable purposes are not locatable under the mining laws." United States v. Bienick, 14 IBLA 290, 293 (1974), 1974 WL 12889, **WL2. While valuable deposits of such minerals as gold and silver are clearly locatable under the mining law, not all material that could be removed from the earth and sold at a profit was considered by the Department to be locatable under the General Mining Law. *See* Id., 14 IBLA at 297, **WL5 (Judge Stuebing concurring). "There are numerous cases involving specific examples of materials which have been held to be not locatable under the general mining law. Among these are … common or inferior limestone 'for building of levees or railroad embankments or filing [sic] up low places,' Holman v. Utah, 41 L.D. 314 (1912);

[1] GSCA submitted a Freedom of Information Act ("FOIA") request to your offices on June 12, 2018, requesting all records/documents associated with the Mine. Unfortunately, outside of a perfunctory email from BLM on June 14, 2018, acknowledging receipt of the FOIA request, BLM has failed to provide any records/documents, despite the fact that the FOIA-mandated deadline of 20 working days to provide the records/documents has long since expired, in violation of FOIA.

[2] Solely for the purposes of this letter, GSCA assumes that the initial years of mining at the site produced locatable minerals. However, because the extent and duration of locatable minerals mining has yet to be verified (due in part to BLM's failure to produce any documents in response to GSCA's FOIA request), GSCA reserves the right at any time to challenge the existence, amount and extent of locatable minerals at the site, both at the current pit and any proposed expansion.

Gray Trust Co. (On rehearing) 47 L.D. 18 (1919), … common rock for 'filling purposes' Solicitor's Opinion M-36295, supra; Holman v. Utah, supra." Id.

In 1947 Congress passed the Materials Act, as amended, 30 U.S.C. §§ 601-604, authorizing the disposition of, inter alia, sand, stone, and gravel "'not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements."' United States v. Mattey, 67 I.D. 63, 65-66 (1960), quoting comments of the Under Secretary of the Interior found in S. Rept. No. 204, 80th Cong., 1st Sess. (1947).

Eight years later, Congress passed the Multiple Use Mining Act of 1955, also known as the Surface Resources Act or Common Varieties Act, 30 U.S.C. § 611, which declared that no deposit of common varieties of, inter alia, sand, stone, or gravel would be considered "a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws." Thus, Congress removed common varieties of those materials from the purview of the mining law and made them subject to the provisions of the Materials Act. United States v. Pitkin Iron Corp., 170 IBLA 352, 354 (2006); United States v. Multiple Use, Inc., 120 IBLA 63, 76A (1991).

Accordingly, it is clear that the "road base," "fill," "rock," and "boulders" that RMR is apparently selling on the local market are not locatable minerals under the 1872 Mining Law. The production of these minerals, then, falls under the Common Varieties Act and 1947 Materials Act – not the 1872 Mining Law. The issue at the RMR site is thus whether the company may continue to produce and sell such mineral materials under the 1982/89 PoO, which was based on production of locatable minerals. As the Interior Board of Land Appeals ("IBLA") has held:

> Two years after the enactment of the Multiple Use Mining Act, the Solicitor addressed an inquiry whether it was permissible for holders of unpatented gold placer mining claims to sell sand and gravel from the claims as a by-product of gold mining operations. He answered "in the affirmative" with respect to valid claims located prior to the July 23, 1955, passage of the Act, "assuming that the sand and gravel is a valuable mineral," but for claims located thereafter, he stated that the claimant could "use the sand and gravel for any mining purpose, **but he has no authority to appropriate and sell it**." Solicitor's Opinion, "Disposal of Sand and Gravel from Unpatented Mining Claims," M-36476 (Aug. 28, 1957) at 2, 4. See 1 American Law of Mining, § 21.03 [2] (2d. ed. 1996). Thus, the Solicitor distinguished between the rights of claimants to dispose of sand and gravel on their unpatented mining claims based upon the date of the location of their claims. **For claims located on or after July 23, 1955, he found the claimants had no right under the mining law to appropriate and sell sand and gravel from their claims. Disposition could only be authorized in accordance with the Materials Act.**

Ronald W. Byrd, 171 IBLA 202, 207-208 (2007), 2007 WL1761028, **WL3 (emphasis added).

In that case, because the "boulder and cobbles" that were being removed from two claims were common variety minerals – the apparent situation at RMR – the IBLA upheld BLM's order to the company that it "cease and desist" from such activities. **"[E]xtraction and removal of stone from those claims could take place, if at all, only pursuant to authorization from BLM under**

the mineral material disposal regulations in 43 CFR Part 3600. To the extent BLM's August 4, 2004, decision ordered Byrd to cease and desist extraction and removal of mineral materials from the Duff and Dan L. Green claims, as an unauthorized use under 43 CFR 3601.72, it is affirmed." Ronald W. Byrd, at 208-209, **WL4 (emphasis added).

Here, because RMR's claims at the site post-date 1955, any removal of these common variety minerals, without the proper mineral material sales contract issued pursuant to 43 CFR Part 3600, is considered a "Mineral Material Trespass" under BLM policy and applicable law. According to BLM Manual Handbook H-9235-1, "Mineral Material Trespass and Abatement":

> **The unauthorized use or disposal of common variety mineral material from a mining claim located after July 23, 1955, is a trespass regardless of whether there is a valid discovery of other locatable minerals, such as gold. …** Trespass damages should accrue from the onset of operations on the claim(s) and liability of the parties begins from that date. Common variety sand and gravel, which occurs with valuable minerals such as gold on unpatented placer mining claims, located on or after July 23, 1955 (P.L. 84-167) (30 U.S.C. 611 et seq.), may not be sold by the claimant, but may be used for on site mining purposes. Solicitor's Opinion M-36467, dated August 28, 1957, Disposal of Sand and Gravel From Unpatented Mining Claims states that "The taking of sand and gravel from a mining location perfected after July 23, 1955, by one with knowledge of the existence and date of location of the claim, is willful trespass."

H-9235-1, Chapter I.A.12 ("Disposal of Common Variety Mineral Material From Mining Claim(s)").
https://www.blm.gov/sites/blm.gov/files/uploads/Media%20Center_BLM%20Policy_H-9235-1.pdf

Under BLM Mineral Material Disposal regulations: "you must not extract, sever, or remove mineral materials from public lands under the jurisdiction of the Department of the Interior, unless BLM or another Federal agency with jurisdiction authorizes the removal by sale or permit. Violation of this prohibition constitutes unauthorized use." 43 CFR § 3601.71(a). "Unauthorized users are liable for damages to the United States, and are subject to prosecution for such unlawful acts (see subpart 9239 of this chapter)." 43 CFR § 3601.72.

Thus, even if the RMR claims still contain any valuable deposits of chemical grade limestone (which GSCA does not admit, nor does the existing evidence support such a finding), RMR cannot remove and sell the common variety minerals without obtaining a mineral materials sale contract from BLM – which has not occurred here.

Because RMR "must not extract, sever, or remove mineral materials from public lands," and because such extraction/removal is an "unauthorized use" of public lands, § 3601.71(a), BLM cannot allow such activities to continue. RMR may attempt to argue that it should be allowed to continue operations if it enters into an escrow agreement with BLM where RMR agrees to pay into an escrow account the value of the common variety minerals while the operation continues. Yet as the IBLA noted:

> No disposal is authorized by the statute where it would be "detrimental to the public interest." 30 U.S.C. § 601 (2000); 43 CFR 3601.6(a). In addition, the regulations preclude

> BLM from disposing of mineral materials if it determines "that the aggregate damage to public lands and resources would exceed the public benefits that BLM expects from the proposed disposition." 43 CFR 3601.11.

Byrd, at 208, **WL4. Here, BLM has never made this determination and any such BLM sale contract proposal would be subject to full public and agency review under the National Environmental Policy Act ("NEPA"), the Federal Land Policy and Management Act ("FLPMA"), and other applicable laws.[3]

In Byrd, the IBLA upheld BLM's order that the claimant "cease and desist removal of mineral material from the Dan L. Green and Duff mining claims because that material on those claims, located after July 23, 1955, may only be disposed of pursuant to the Materials Act, as amended, and its implementing regulations in 43 CFR Part 3600." Byrd, at 216, **WL8. In that case, because there was no credible allegation that the removed minerals were locatable, a cease and desist order, rather than allowing unauthorized removal/sale via an escrow agreement, was the proper legal procedure.

RMR does have the option of applying for a mineral material sales contract to remove and sell the common variety minerals, instead of continuing under the current PoO for the mining of alleged locatable limestone. However, as noted above, the legal and permitting regime for a permit under 43 CFR Part 3600 is very different from the permitting of locatable minerals mining under 43 CFR Part 3809. At a minimum, the Part 3600 rules, unlike the Part 3809 rules, preclude BLM from authorizing any activity/sale without meeting the "public interest" standard at 43 CFR § 3601.

Thus, under applicable law, regulation, and Interior Department policy and precedent, BLM should immediately order RMR to cease and desist from the removal and sale of any common variety materials at the site. BLM should also investigate and determine, from RMR as well as local companies, governments, and other markets that may have purchased such minerals from RMR, the date at which such sales began.[4] As stated in H-9235-1 above, "Trespass damages should accrue from the onset of operations on the claim(s) and liability of the parties begins from that date." In addition, "Unauthorized users are liable for damages to the United States, and are subject to prosecution for such unlawful acts (see subpart 9239 of this chapter)." 43 CFR § 3601.72.

Further, although unauthorized sales should be immediately investigated and stopped under Part 3600, even if BLM (erroneously) considers removal of these minerals to be under the Part 3809 locatable mineral regulations, those regulations authorize BLM to suspend all operations not in accordance with the PoO (such as unauthorized removal/sale of common variety minerals), if such

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[3] Further, according to BLM's Mineral Material Trespass Prevention and Abatement Manual Handbook, the possibility for establishing an escrow account occurs when BLM is considering a ***new*** PoO. H-9235-1, Chapter I.A.10. The escrow account option should not be available to allow continued removal/sale of undisputed common variety minerals in violation of an existing PoO.

[4] Relatedly, BLM should also investigate and determine whether any chemical-grade limestone is still being produced at the RMR site, including determining the nature and extent of sales of chemical-grade limestone. It should be noted that the original proposed use of the chemical-grade limestone in the 1982/89 PoO was to supply local coal mines with dust-suppression minerals – a use and purchasers that no longer appear to exist.

activities pose a threat to public health and safety or the environment. "BLM may order an immediate, temporary suspension of all or any part of your operations without issuing a noncompliance order, notifying you in advance, or providing you an opportunity for an informal hearing if. (i) You do not comply with any provision of your notice, plan of operations, or this subpart; and (ii) An immediate, temporary suspension is necessary to protect health, safety, or the environment from imminent danger or harm." 43 CFR § 3809.601(b)(2).

Here, at a minimum, the hauling of significant amounts of these materials through local residential neighborhoods and the City of Glenwood Springs – uses and levels of impacts not fully analyzed or authorized in the 1982/89 PoO – pose ongoing threats that warrant immediate suspension.

II. Unauthorized Operations

In addition to the apparent unauthorized removal and sale of common variety materials, operations at the site have violated the provisions of the current 1982/89 PoO. BLM's recent Minerals Inspection Report of the RMR operations, dated March 7, 2018, details numerous unauthorized operations that require immediate BLM action. These include; (1) unauthorized exploratory drilling; (2) unauthorized mine bench development; (3) failure to have an approved surface drainage plan (storm water management plan); and (4) unauthorized acreage disturbance in exceedance of the 1982/89 PoO.

Under FLPMA and BLM mining regulations, any action not in conformance with an approved PoO constitutes illegal "unnecessary or undue degradation," which is not allowed to occur on BLM-managed public land. FLPMA requires that the BLM "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). This is known as the "prevent UUD" standard. This duty to "prevent undue degradation" is "the heart of FLPMA [that] amends and supercedes the Mining Law." Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003). "FLPMA, by its plain terms, vests the Secretary of the Interior [and the BLM] with the authority – indeed the obligation – to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land." Id. BLM cannot approve a mining project that would cause UUD. 43 C.F.R. § 3809.411(d)(3)(iii). "FLPMA's requirement that the Secretary prevent UUD supplements requirements imposed by other federal laws and by state law." Center for Biological Diversity v. Dept. of Interior, 623 F.3d 633, 644 (9th Cir. 2010).

"Unnecessary or undue degradation means conditions, activities, or practices that: (1) Fail to comply with one or more of the following: … the terms and conditions of an approved plan of operations." 43 CFR §3809.5. Thus, BLM cannot allow operations causing UUD to continue.

(1) Unauthorized Exploratory Drilling: According to BLM's March 7, 2018 Inspection Report:

> On January 19, 2018, I was informed that RMR had conducted exploratory drilling in December 2016. **This drilling was performed without BLM authorization.** The drilling consisted of six exploratory drill holes (no coring) within the DRMS-approved permit boundary. The holes had been backfilled with cuttings and the surface disturbance reclaimed. The 1982 Plan of Operations for the Mid-Continent Quarry does not include an

> exploration component and there is no existing authorization for exploratory drilling within or around the quarry perimeter in the August 18, 1982 Plan of Operations approval. There is a brief reference to exploration having been conducted between 1983-1985 in the 1989 Plan of Operations modification (AM-1); however, there is no record of approval for this activity in the July 21, 1989 Plan of Operations modification approval.

2018 Inspection Report at 3 (emphasis added). BLM should determine and implement the proper penalties and fines for these unauthorized activities.

> (2) Unauthorized Mine Bench Development: Also as noted in the 2018 Inspection Report:
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> According to the 1982 Plan of Operations (Exhibit D, Section 4. Blasting Plan): "Limestone is quarried by developing benches in the solid rock with the bench width being at least twice the height of the high wall." This statement does not match what currently exists on the mine benches. Additionally, according to the 1989 approved Plan of Operations modification: "Only one quarry bench will be worked at a time. Bench widths will not exceed 60 feet and the length of the portion being quarried will be approximately 300 feet." Any upcoming Plan of Operations modification must include an update to the mining plan and mine bench design.

2018 Inspection Report at 2. According to BLM, this violation of the PoO has been ongoing for years. In its April 12, 2016 Minerals Inspection Report for the RMR site, BLM acknowledged:

> There are currently two mine benches and a third mine bench in development. The lower bench is approximately 600 feet long, 25 feet wide, and 50 feet tall. The second mine bench is approximately 600 feet long, 12 to 14 feet wide, and 65 feet tall. According to the 1982 Plan of Operations: "Limestone is quarried by developing benches in the solid rock with the bench height being at least twice the height of the high wall." This statement does not match what exists on the mine benches. Additionally, according to the 1989 approved Plan Amendment 1: "Only one quarry bench will be worked at a time. Bench widths will not exceed 60 feet and the length of the portion being quarried will be approximately 300 feet." CalX is in the process of building a road and blasting a new highwall for a third mine bench on the western side of the operation. The third bench is currently 16 feet wide and 50 feet high.

2016 Inspection Report at 4.

Despite these findings in 2016 and 2018, BLM has apparently taken no substantive action to correct or stop these unauthorized activities. At most, according to the 2018 Inspection Report, BLM states that: "Any upcoming Plan of Operations modification must include an update to the mining plan and mine bench design." 2018 Report at 2. Thus, instead of suspending operations not in conformance with the approved PoO, and taking appropriate enforcement actions, BLM is allowing these actions to continue – apparently deferring any action until a revised PoO is submitted and approved at some unknown point in the future.

Instead, BLM should exercise its ample authority to "revoke your plan of operations" if "a pattern of violations exist at your operations." 43 CFR § 3809.602. Although for all of the PoO

violations noted herein, BLM should notify RMR of the agency's findings and enforcement actions, 43 CFR §§ 3809.600-701, simply deferring compliance to a potential future PoO is not acceptable.

(3) Failure to Have an Approved Surface Drainage Plan (Storm Water Management Plan).

The 2018 Inspection Report details the inadequacies of the current operations to adequately ensure protection of water quality at and below the site, yet RMR does not appear to have the proper storm water protection plans:

> A comprehensive water management plan will be required in any future Plan of Operations modification (43 CFR 3809.401((b)(2)(iii)). Per 43 CFR 3809.420(b)(5): "all operators shall comply with applicable Federal and state water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 et seq.)." The 2015 Colorado River Valley Field Office Resource Management Plan, Appendix K – Best Management Practices (BMPs) and Conservation Measures states: "MIN-17: Before activities take place, every pad, access road, or facility site will have an approved surface drainage plan (storm water management plan) for establishing positive management of surface water drainage, to reduce erosion and sediment transport. The drainage plan will include adaptive BMPs, monitoring, maintenance and reporting. BMPs may include run-on/run-off controls such as surface pocking or revegetation, ditches or berms, basins, and other control methods to reduce erosion. Pre-construction drainage BMPs will be installed as appropriate." The BPMs also state: "MIN-24: As detailed in the site plan for surface/storm water management, drainage from disturbed areas will be confined or directed to minimize erosion, particularly within 100 feet of all drainages. No runoff, including that from roads, will be allowed to flow into intermittent or perennial waterways without first passing through sediment-trapping mechanisms such as vegetation, anchored bales or catchments."

2018 Inspection Report at 4. BLM raised the same deficiencies in the 2016 Inspection Report, at 2. Again, despite these problems, BLM's apparent solution is to simply allow the situation to continue and defer compliance until the future potential PoO. For example, as BLM notes, these plans must be in place "Before activities take place." There is no excuse for RMR to not have these plans in place, as they have been required by the Colorado BLM for years.

(4) Unauthorized Acreage Disturbance in Exceedance of the 1982/89 PoO.

BLM has documented that RMR has exceeded, and continues to exceed, the permitted acreage disturbance in the 1982/89 PoO. The 2016 Report found this violation:

> Additionally, records of approvals for the permitted boundary vary between the BLM and DRMS. On June 3, 1992, ORMS approved Amendment 2, which extended the permit boundary and increased the permitted area from 15.7 acres to 34.4 acres (other DRMS records state a permitted boundary of 32.78 acres) in order to include an area affected by crusher fines washout from the lower bench of the quarry. **There is no record of this proposal or its approval in BLM records. BLM records reflect an approved perimeter area of 15.7 acres from the 1989 Amendment 1**, which was approved by the BLM on July 21, 1989. When measured by aerial imagery in ArcGIS, **the currently disturbed area is calculated to be approximately 17.5 acres**. The proposed CalX Plan of Operations Modification

should include this permitted area increase in order for both agencies' permits to be current and accurate.

2016 Report at 2 (emphasis added). Yet despite admitting that RMR has exceeded the disturbance acreage in the PoO (17.5 over 15.7 acres), BLM's apparent solution was to simply defer the violation to a future PoO revision.

The problem is now apparently worse, as RMR admits that "The calculated area of the total affected land to date is 20.8 acres." December 28, 2017 RMR letter to Colorado Division of Reclamation, Mining and Safety ("DRMS"), at 1 (attached). *See also* January 5, 2018 letter from DRMS to RMR (attached)(noting the 20.8 acres).

At a minimum, BLM should immediately suspend any operations that exceed the currently-authorized 15.7 acres, as violating the PoO.

Conclusion

Based on the evidence detailed above, including BLM's own findings and RMR's own documents, it is clear that unauthorized use of public lands is occurring, and has occurred, at the RMR site. Yet, despite full knowledge of these problems, BLM has done nothing to curtail operations or otherwise protect the public. In order to meet its statutory duties to protect the public interest, BLM should immediately begin enforcement proceedings to stop such uses, impose the required penalties and fines, and restore to the public the value of the removed minerals from the public's land.

The Glenwood Springs Citizens' Alliance looks forward to your immediate attention to this matter. Please direct your response to the undersigned.

Sincerely,

/s/ Roger Flynn

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Cc: City of Glenwood Springs, Mayor Michael Gamba
Garfield County Board of County Commissioners (via County Manager Kevin Batchelder)